



# POLICY BRIEF



## TITLE IX AND THE NEW BATTLE FOR WOMEN'S EDUCATION

Enacted as part of the Education Amendments of 1972, Title IX secured opportunities for women and girls in education, including women's school sports. Yet, the Obama and Biden administrations have made Title IX a tool for redefining the term "sex" and mandating sexual assault resolution protocols on college campuses by executive fiat. On June 23, 2022, the Biden Administration released proposed rule governing Title IX that would redefine "sex" and eliminate due process protections if finalized.<sup>1</sup> Ironically, the administration is attempting to tighten guidance on sexual misconduct that threatens female students while also opening female-only private spaces to males.<sup>2</sup> The proposed changes jeopardize the level playing field established by Title IX and create a new protected class.<sup>3</sup>

- **What is Title IX?**

- Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>4</sup>
- For decades Title IX functioned to ensure opportunity for women in education programs. For example, today, female high school participation in sports is 10 times the 1972 rate.<sup>5</sup>
- In 2011, the Department of Education under the Obama administration issued new guidance on Title IX via a "Dear Colleague Letter." The administration cited that sexual assault and harassment were impacting women's education and so the guidance expanded Title IX non-discrimination practices to include policies for universities on adjudicating sexual misconduct accusations.<sup>6</sup> The guidance instructed schools to replace the "beyond a reasonable doubt" standard of proof with a "preponderance of evidence"; use a single administrator to investigate, prosecute, and judge cases; and limit cross-examination.<sup>7</sup> If schools did not comply, federal funds could be withheld.<sup>8</sup> These changes altered the function of Title IX going forward.
- The Department of Education under the Trump administration withdrew the Obama era guidance in 2017 and issued new rules in 2020 that clarified the definitions of sexual harassment and assault and established due process protections through the normal rule-making process.<sup>9</sup>

- **The proposed rule re-defines sex to include sexual orientation and gender identity.<sup>10</sup>**

- The Biden administration's proposed rule re-interprets Title IX to include discrimination based on sexual orientation and gender identity. The administration claims this is a needed change based on an expansive view on the Supreme Court ruling in *Bostock v. Clayton County* on Title VII of the Civil Rights Act without explaining why Title IX does not currently protect equal educational opportunities for women.<sup>11</sup>
- This change threatens the decades of Title IX protecting women in education by opening safe, women-only spaces to anyone identifying as a woman regardless of their biology.<sup>12</sup> From locker rooms to bathrooms, biological males will be allowed in women's facilities under Biden administration's rule.
- Further, the proposed rule removes essential protections for religious institutions who adhere to their deeply held beliefs on sexuality and gender. Previously, the Title IX rule allowed religious organizations to be

exempted in the case of “conflict with a specific tenet of religious organization.” This is excluded from the proposed rule.<sup>13</sup>

- The proposed rule notes that the Department of Education plans to determine if it is necessary to issue a separate rule addressing school-sponsored sports teams.<sup>14</sup>
- **The proposed rule rescinds due process protections for universities’ investigations of sexual misconduct.**<sup>15</sup>
  - The proposed rule permits a student to be accused of sexual misconduct without the requirement to have a live hearing before a judge with cross-examination of witnesses.<sup>16</sup>
  - Further, the proposed rule allows sexual misconduct investigations in the absence of a formal complaint. Therefore, university personnel can report suspected sexual misconduct via third-party information without the victim reporting harm.<sup>17</sup> Even Catherine Lhamon, Assistant Secretary of Education for Civil Rights for the Biden administration who oversees enforcement of Title IX regulations, said that the accused need not be presumed innocent.<sup>18</sup>
  - The proposed rule also reduces the burden of proof required for conviction. The Trump administration required schools to use the “clear and convincing” standard of evidence, yet the new rule reduces the standard to “preponderance of evidence.”<sup>19</sup>
  - The proposed rule permits a single-investigator model, which allows one school administrator to function as fact finder, prosecutor, and judge in each case.<sup>20</sup> This model denies the common practice of using a neutral, third-party judge to ensure fairness.
  - Each of these changes to Title IX procedures erode fairness, due process, and the assumption of innocent until proven guilty. Rather than protect women, these changes have the potential to ruin the lives of the innocent and let the guilty off free.<sup>21</sup>
- **Congress can act to properly protect women and girls in education.**
  - Members of Congress can offer comments on the proposed rule, expressing their concerns to the Department of Education.
  - Congress may also support H.R. 426, the Protection of Women and Girls in Sports Act of 2021, which prohibits federal funding from being given to schools who allow men to play women’s sports.<sup>22</sup> 18 states have already passed laws upholding biological sex as the standard for school athletic participation.<sup>23</sup>
  - Congress can also introduce legislation to require that all investigations of sexual violence be handled by law enforcement and establish a clear adjudication process for other sexual misconduct accusations on campus.<sup>24</sup>

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<sup>1</sup> “The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment.” U.S. Department of Education. June 23, 2022. <https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment>

<sup>2</sup> Melnick, R. Shep. “The Strange Evolution of Title IX.” Summer 2018. <https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix>

<sup>3</sup> Patterson, Jennifer. “Title IX turns 50.” *World*. June 21, 2022. <https://wng.org/opinions/title-ix-turns-50-1655805474>

<sup>4</sup> “Title IX of the Education Amendments of 1972.” U.S. Department of Justice. <https://www.justice.gov/crt/title-ix-education-amendments-1972>

<sup>5</sup> Perry, Sarah. “Fox in the Henhouse: Biden’s New Title IX Rule Puts Women in Danger” Heritage Foundation. July 5, 2022. <https://www.heritage.org/gender/commentary/fox-the-henhouse-bidens-new-title-ix-rule-puts-women-danger-0>

<sup>6</sup> Eden, Max. “The Dilemmas of Education Deregulation: Lessons from Secretary DeVos’s Tenure” American Enterprise Institute. June 9, 2022. <https://www.aei.org/research-products/report/the-dilemmas-of-education-deregulation-lessons-from-secretary-devoss-tenure/> and Schoof, John. “Dangerous Changes Coming for Title IX.” Heritage Foundation. November 29, 2021. <https://www.heritage.org/education/commentary/dangerous-changes-coming-title-ix>

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- <sup>8</sup> Eden, Max. “The Dilemmas of Education Deregulation: Lessons from Secretary DeVos’s Tenure” American Enterprise Institute. June 9, 2022. <https://www.aei.org/research-products/report/the-dilemmas-of-education-deregulation-lessons-from-secretary-devoss-tenure/>
- <sup>9</sup> Perry, Sarah. “The Department of Education’s Intended Revision of Title IX Fails Regulatory and Civil Rights Analyses.” Heritage Foundation. June 22, 2022. <https://www.heritage.org/civil-rights/report/the-department-educations-intended-revision-title-ix-fails-regulatory-and-civil> and “U.S. Department of Education Title IX Final Rule Overview.” <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf>
- <sup>10</sup> “Fact Sheet: U.S. Department of Education’s 2022 Proposed Amendments to its Title IX Regulations.” <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf>
- <sup>11</sup> “U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity.” U.S. Department of Education. June 16, 2021. <https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity> and Perry, Sarah; Kassal, Abby. “Lia Thomas Was Just the Beginning. Biden Administration Wants to Eliminate Women’s Sports.” The Daily Signal. April 8, 2022. <https://www.dailysignal.com/2022/04/08/lia-thomas-was-just-the-beginning-the-biden-administration-wants-to-eliminate-womens-sports> and Perry, Sarah. “The Department of Education’s Intended Revision of Title IX Fails Regulatory and Civil Rights Analyses.” Heritage Foundation. June 22, 2022. <https://www.heritage.org/civil-rights/report/the-department-educations-intended-revision-title-ix-fails-regulatory-and-civil>
- <sup>12</sup> Perry. “Fox in the Henhouse.” <https://www.heritage.org/gender/commentary/fox-the-henhouse-bidens-new-title-ix-rule-puts-women-danger-0>
- <sup>13</sup> Perry, Sarah. “Biden’s New Title IX Rule Guts Protections for Women and Girls. Here’s How to Fight it.” Heritage Foundation. July 18, 2022. <https://www.heritage.org/gender/commentary/bidens-new-title-ix-rule-guts-protections-women-and-girls-heres-how-fight-it>
- <sup>14</sup> “Fact Sheet: U.S. Department of Education’s 2022 Proposed Amendments to its Title IX Regulations.” <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf>
- <sup>15</sup> “Fact Sheet: U.S. Department of Education’s 2022 Proposed Amendments to its Title IX Regulations.” <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf>
- <sup>16</sup> “Summary of Major Provisions of the Department of Education’s Title IX Notice of Proposed Rulemaking.” <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-chart.pdf>
- <sup>17</sup> Soave, Robby. “5 Ways Biden’s New Title IX Rules Will Eviscerate Due Process on Campus.” Reason. June 23, 2022. <https://reason.com/2022/06/23/title-ix-rules-cardona-biden-sexual-misconduct-campus/>
- <sup>18</sup> Schoof, John. “Dangerous Changes Coming for Title IX.” Heritage Foundation. November 29, 2021. <https://www.heritage.org/education/commentary/dangerous-changes-coming-title-ix>
- <sup>19</sup> “Summary of Major Provisions of the Department of Education’s Title IX Notice of Proposed Rulemaking.” <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-chart.pdf>
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- <sup>21</sup> Poliakoff, Michael; McGuire Steven. “College Joe Meets Biden’s Title IX.” Real Clear Education. July 19, 2022. [https://www.realcleareducation.com/articles/2022/07/19/college\\_joe\\_meets\\_bidens\\_title\\_ix\\_110746.html](https://www.realcleareducation.com/articles/2022/07/19/college_joe_meets_bidens_title_ix_110746.html)
- <sup>22</sup> H.R. 426 – Protection of Women and Girls in Sports Act of 2021. Congress.gov <https://www.congress.gov/bill/117th-congress/house-bill/426?q=%7B%22search%22%3A%22protection+of+women+and+girls+in+sports%22%7D&s=1&r=2>
- <sup>23</sup> Yurcaba, Jo. “Louisiana becomes 18<sup>th</sup> state to enact a transgender athlete ban.” NBC News. June 7, 2022. <https://www.nbcnews.com/nbc-out/out-politics-and-policy/louisiana-becomes-18th-state-enact-transgender-athlete-ban-rcna32328>
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